

EXHIBIT 5

MR 11-16-05.txt

1 Case No. [!CASE NO.]

2 Department No. [!DEPT##]

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6 IN THE [!DISTRICT#] JUDICIAL DISTRICT COURT

7 OF THE STATE OF NEVADA

8 IN AND FOR THE COUNTY OF [!COUNTY NAME]

9 -oOo-

10

11 [!PLAINTIFFNAME],

12 Plaintiffs,

13 vs.

14 [!DEFENDANTNAME],

15 Defendants.

16 _____/

17

18

DEPOSITION OF

19

[!WITNESSNAME]

20

[!MONTH] [!DAY OF MONTH], [!YEAR]

21

[!CITY], Nevada

22

23

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(775) 883-7950 or (775) 323-3411

24

REPORTED BY: JACKIE ADAMS CA CSR 7455; NV CSR 278; RPR
COMPUTER-ASSISTED TRANSCRIPTION BY: caseCAtalyst 4

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1 A P P E A R A N C E S

2

3 FOR THE PLAINTIFFS: [!FIRM1]
4 By: [!ATTORNEY1]
[!ADDRESS-A1]
5 [!CITY1], [!STATE1] [!ZIP1]

6

7 FOR THE DEFENDANTS: [!FIRM2]
8 By: [!ATTORNEY2]
[!ADDRESS-A2]
9 [!CITY2], [!STATE2] [!ZIP2]

10

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12 ALSO PRESENT: [!ALSO PRESENT]

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1 BE IT REMEMBERED that on [!DAY OF WEEK], the

2 [!ORDINAL DATE] day of [!MONTH], [!YEAR], at the hour

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3 of [!START TIME] [!AM/PM] of said day, at the offices
4 of [!LOCATION NAME], [!LOCATION ADDRESS],
5 [!LOCATION CITY], Nevada, before me, JACKIE ADAMS, a
6 notary public, personally appeared [!WITNESSNAME], who
7 was by me first duly sworn and was examined as a
8 witness in said cause.

9

10 -oOo-

11

12 [!WITNESSNAME],
13 called as a witness herein, having been
14 duly sworn, testified as follows:

15

16 EXAMINATION

17

18 BY MR. LITOW:

19 Q Good afternoon, Mr. Rosenberg.

20 A Hi.

21 Q My name is Jason Litow from the law firm of
22 Covington and Burling in Washington DC. My colleague,
23 Ron Dove, and I represent Glaxo SmithKline, a
24 pharmaceutical company that's a defendant in had
25 action.

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1 A Okay.

2 Q Can you please state and spell your name for
3 the record.

4 A Okay, it's Mel, M-E-L, Rosenberg,
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5 R-O-S-E-B-E-R-G.

6 Q As your current business address?

7 A 1100 East William Street, Suite Two Hundred,

8 Carson City, Nevada.

9 Q Have you ever been deposed before?

10 A Nope, this is the first time.

11 Q Okay. Have you ever testify at trial?

12 A No.

13 Q You ever provided legislative hearing

14 testimony?

15 A Yes.

16 Q How many times was that?

17 A Twice.

18 Q And the first time that you provided such

19 testimony, when was that?

20 A Both times were in the past legislative

21 season.

22 Q So that would be --

23 A No -- yeah, in the past legislative season;

24 in the February to May time frame.

25 Q of 2005?

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1 A Of four -- of -- yes, of five, yeah.

2 Q Okay. And the first such occasion, what were

3 you -- what was the nature of your testimony?

4 A Actually, I was at the table with another

5 member of the team and we were talking about -- in

6 both cases, I was at the table with someone else, they

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1 relocate to eventually, I came out here in August of
2 '02, and got a job -- my current job with the State in
3 February of '03.

4 Q In August of '02, you started here?

5 A I moved the family here unemployed.

6 Q Okay. So you first started working for the
7 state of Nevada in February '03?

8 A February '03.

9 Q And what was your title then?

10 A It is my current title. It's information
11 systems manager one.

12 Q And what are your job responsibilities?

13 A Well, basically I have two generic areas.
14 One is IT, which means that my team owns the support
15 of and maintenance of the computing infrastructure for
16 the division, you know, as part of the State. And so
17 desktop, laptop, computer servers, data, we support,
18 maintain, implement that and the application software
19 that goes with it.

20 I have --

21 Q So there are two areas?

22 A Yeah. I have a -- what I call an information
23 systems role, which is where we act as the technical
24 expert on major systems projects; the single major one
25 that we have is the MMIS system, so that team is the

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1 bridge between the rest of the agency and -- who sets
2 policy, we figure out with the vendor how to best
3 implement the policy at a technical level and work
4 with them through the process of getting it
5 implemented or bugs fixed or enhancements done.

6 Q To whom do you report?

7 A Chuck Duarte.

8 Q And approximately how many employees or in
9 the IT department?

10 A My total department's twelve people.

11 Q So you're the head of that department?

12 A Uh-huh. It's called a unit actually.

13 Department in the State is actually my boss's boss's
14 area.

15 Q Right. And who was the info systems manager
16 prior to your arrival at Nevada?

17 A One of the people in my team was the acting
18 manager when I arrived.

19 Q And who is that?

20 A John Whaley, W-H-A-L-E-Y.

21 Q So he was the -- he was the acting director
22 when you arrived?

23 A Uh-huh.

24 Q And do you know how long he had been the
25 acting director?

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1 A It is my understanding that that was roughly
2 six months.

3 Q Who was the director before him?

4 A I -- there was somebody there and I don't
5 remember the name. If you need it, I can find it,
6 but --

7 Q Do you recall the names of any other
8 directors before -- prior to John Whaley?

9 A No.

10 Q Mr. Rosenberg, what list serves does the
11 division -- Medicaid division participate in; by list
12 serve, meaning an e-mail group?

13 A Well, I can't answer definitively for the
14 Division. There are lots and lots of them. The --
15 you know, my unit participates in several of the CMS
16 list serves as a good way to get information about
17 what's going on in the CMS world. And there is one
18 non-CMS list serve that we're actually in the process
19 of subscribing to.

20 Q And which serve is that?

21 A It's the wedi, W-E-D-I.

22 Q Generally what is that for?

23 A It's a list serve that that generally
24 provides a view of the Medicaid world of up coming
25 events -- technical changes for -- you know, for the

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1 Medicaid world and of particular interest is their
2 view on the national provider ID project that's coming

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3 up in a year and a half -- actually -- yeah, in a year
4 and a half.

5 Q And you mentioned your unit subscribes to the
6 CMS list serve. Do you know if other employees in the
7 division have subscribed to that list serve as well?

8 A Well, there's not a single list serve. There
9 is -- each -- each focus area, you know, in CMS may or
10 may not have a list serve, and, you know, a variety of
11 people -- and they're basically free, so subscribing
12 doesn't have to be made known to me.

13 Q So each individual employee kind of
14 determines what list serve he or she wants to
15 participate in?

16 A That's correct, yes.

17 Q Do you know with a list serves Charles Duarte
18 belongs to for example?

19 A No.

20 MR. LITOW: At this time I'd like to ask the
21 court reporter to mark as Rosenberg Exhibit One a
22 document bearing a Bates label N-V zero three seven
23 six zero through N-V zero three seven nine three,
24 which is entitled the state of Nevada Department of
25 Human Resources, Division of Health care financing and

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1 policy authorized record retention and disposition
2 schedule.

3 (Exhibit Number 1 marked for identification.)

4 BY MR. LITOW:

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- 5 Q Mr. Rosenberg, just take a moment to review
6 that document. Have you ever seen this document
7 before, Mr. Rosenberg?
- 8 A Uh-huh, yes.
- 9 Q And what is it?
- 10 A It's our policy on archive and disposition of
11 paper documents.
- 12 Q And I note that it's dated June nine, 2004.
13 To your knowledge, is this the document retention
14 policy that is currently in effect?
- 15 A I do not know for a fact whether it is or
16 not. It is -- it appears to be a rather recent one,
17 but I don't know if we've changed it or added --
18 updated it since then.
- 19 Q So you don't recall having seen a retention
20 policy with a later date than that?
- 21 A No, I don't recall seeing one with a later
22 date.
- 23 Q Have you seen document retention policies
24 with an earlier date?
- 25 A What I -- you know, since I have been there,

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- 1 I remember one time where, in the review process, a
2 document that I assume would have been this document
3 was sent through and approved. I don't remember when
4 it was, and that's my exposure to this document.
- 5 Q Okay. Does the document retention policy
6 cover electronic documents? And by electronic

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7 documents, I mean, you know, word processing
8 documents, spread sheets, e-mail, things of that
9 nature.

10 A Not in electronic form.

11 Q So the policy is only meant to apply to paper
12 documents?

13 A I -- my understanding is that the decision
14 was that if it's something we need to retain, we need
15 to drop it to paper and then put it in the State
16 archive, because the archive only handles paper
17 documents, or it handles tapes, but the best way our
18 decision was to convert them to paper.

19 Q So if there were a document in electronic
20 format that, pursuant to this policy, needed to be
21 retained, it would have to be printed out or some
22 other way converted to a paper document; is that
23 correct?

24 A Yes.

25 Q So the retention requirements apply

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1 regardless of whether the document is initially in
2 electronic format or paper format, correct?

3 A Correct.

4 Q Who's primarily responsible for administering
5 the retention policy?

6 A There's a gentleman, Mr. Liveratti.

7 Q What exactly is his role with respect to the
8 retention policy?

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9 A One of his duties is called compliance, and
10 so things that. It is my understanding that what that
11 means is when there are issues of whether or not we
12 are adhering to the applicable statute or law,
13 complying with those, it is his job to make sure that
14 the agency has the appropriate policy and that we're
15 following those and that we understand how it applies
16 to us.

17 Q So if there were instances of a need to
18 enforce the policy, that would be Mr. Liveratti's
19 purview?

20 A That is my understanding, yes.

21 Q And what does the State do to ensure that the
22 employees are familiar with the contents of the
23 document retention policy other than just distributing
24 the policy to them?

25 A You'd have to ask Mr. Liveratti.

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1 Q So you've never attended seminars or things
2 of that nature that kind of go through the different
3 aspects of the retention policy that might affect, you
4 know, your area of work?

5 A I have not attended anything like that.

6 Q And do you know if such -- you know, if
7 seminars, you know, have been conducted at all in
8 other areas of Medicaid?

9 A Not to my knowledge.

10 Q Mr. Rosenberg, could you please turn to the

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11 second page of the document, which is labeled on the
12 bottom N-V zero three seven six one.

13 A Uh-huh.

14 Q And in particular, I'd like to direct your
15 attention to the area entitled disposition holds and
16 underneath that, litigation. Do you see where I'm --

17 A Uh-huh.

18 Q Can you just take a moment just to review --
19 read with an it says there, and then I'll ask you a
20 few questions about it.

21 A Okay.

22 Q My understanding is that this section on
23 disposition holds requires an agency to take certain
24 steps to preserve documents when it learns of
25 litigation. Is that correct or is that generally --

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1 would you agree with that characterization?

2 A My understanding is this is setting out what
3 we should be doing with documents that we believe
4 pertain to such a litigation.

5 Q And it says that all records pertaining to
6 the litigation should be identified and separated from
7 other files and protected, correct?

8 A Yes.

9 Q Has such a disposition hold been in effect as
10 a result of this case?

11 A I don't know what has been done in the other
12 people's areas.

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13 Q So air not aware of any disposition hold on
14 documents in this case, correct?

15 A I'm not personally aware of that.

16 Q I understand your when you answer this
17 question it may be limit the to the time you started
18 at Medicaid which is February of '03, but -- so since
19 you have been an at Medicaid, what steps has the
20 Division taken to ensure that -- the preservation of
21 electronic documents that might pertain to the
22 litigation?

23 A What steps have been taken to preserve
24 electronic documents?

25 Q Correct.

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1 A I'm not aware of any specific steps to take
2 care of electronic documents.

3 Q And by electronic documents, I'm also
4 including e-mails. Does your answer remain the same?

5 A I would include electronic -- e-mail as an
6 electronic document.

7 Q Since you've been at Nevada Medicaid, has a
8 disposition hold ever been entered in any -- at any
9 time since you've been here?

10 A I'm not aware of one.

11 Q For example, did the IT department -- and
12 forgive me if I use the word department instead of
13 unit, but I mean it interchangeably.

14 Did the IT unit every take any actions during

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15 the time you've been here for example to prevent
16 e-mails from being deleted, you know, that might
17 pertain to the litigation?

18 A No.

19 Q why any attempts made to isolate hard drivers
20 or network drives or archives or users that might
21 contain responsive -- strike that. Was any attempt
22 made to isolate throws drives, archives or users where
23 relevant documents might exist?

24 A No, not to my knowledge.

25 Q Was any attempt made to restore potentially

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1 responsive deleted data from individual hard drives or
2 network drives?

3 A This gets a little hard to answer since we
4 are not -- I mean, the policy isn't to maintain
5 electronic stuff and to isolate it.

6 Q I understand that. I was just meaning --

7 A It's a paper document protection policy. Now
8 at a deep -- at a more specific level, could my
9 support unit have received calls to restore data and
10 we would have done that to the best of our ability,
11 yes.

12 Do I know what that data was, no. Do I know
13 if any of those requests actually were fielded during
14 whatever time frame I know that we have from time to
15 time dealt with disk corruption and file recovery,
16 that's an ongoing activity of an IT department. But I

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17 have no knowledge what the files were and whether or
18 not they at all pertained to this in any way.

19 Q What operating system does the Medicaid
20 division use? Is it windows-based?

21 A If you're asking are we using windows versus
22 a Unix-based, it is windows-based.

23 Q And has it always been windows-based to your
24 knowledge?

25 A During my tenure, it has always been

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1 windows-based. I don't know how far back in time that
2 goes.

3 Q I'm going to focus now on electronic
4 documents other than e-mail. This would include
5 documents -- word processing documents, spread sheets,
6 power points, data bases, presentation, PD F files,
7 scan documents, things of that nature.

8 Can you tell me generally what applications
9 employees at Medicaid would have on their computer to
10 create these types of documents?

11 A The vast majority of all these documents
12 would be the mike soft office suite: Word, Excel,
13 Power Point, Access.

14 Q Adobe acrobat as well?

15 A We have a limited number of licenses to
16 create Adobe Acrobat files, and we do have some older
17 applications. We have one that I know of that is
18 based on Paradox and Word Perfect.

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16 for documents relating to this litigation?

17 A I have no knowledge.

18 Q What -- is it possible to restore and access
19 electronic documents that have been deleted from an
20 individual hard drive or from a network hard drive?

21 A I'm -- let's try and clarify that.

22 Q It's kind of a broad question, so let me see
23 if I can clarify it for you. If documents are put on
24 the server, then if an individual user, you know, with
25 access to it just, you know, deletes the document for

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1 whatever reason, is it possible to access that
2 document again or is it gone?

3 A Depends on the timing of the backup of when
4 the document was saved with respect to the backup and
5 the deletion.

6 Q So when they delete it, they're deleting it
7 from the network, but it remains on the backup
8 assuming it had been backed up?

9 A Assuming it had been backed up and assuming
10 they discovered the deletion before the backups
11 recycle and purge themselves of the backup.

12 Q Okay, so let's talk about that for a minute.
13 How often do the backups recycle?

14 A We do daily, weekly, and monthly backups.
15 The daily's recycle every four days, the weekly's,
16 every two months, and as of two months ago, we started
17 monthly backups with a planned recycle of a year.

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18 Q So when you do a recycle, does that mean old
19 documents are -- you know, are removed from the backup
20 and new ones are put on it or how is --

21 A The -- by recycle, I mean, we reuse a tape
22 and store the brand new image on it which overwrites
23 the prior image.

24 Q How do you determine which tape to over
25 write? Do you start with the older ones?

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1 A The generic approach is you take the oldest
2 one and reuse it.

3 Q Okay.

4 A In some cases where it's an automatic tape
5 writer, then it -- they're loaded in and they recycle.
6 Now a -- and then on some of them where it's an
7 individual tape, a where a human has to go to a vault
8 and bring back the tapes, they're going to look and
9 try to take the oldest one, but whether or not they do
10 is subject to human encounters.

11 This is also subject to tape degradation and
12 discovery that a tape has gone bad on us, in which
13 case we remove it and destroy it and put in a brand
14 new tape.

15 Q And generally when you're doing a recycle,
16 how old is the data that's going to be on the tape
17 that you're taping over?

18 A well, like I said, on the daily's, four days,
19 the weekly's, two months.

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20 Q How do you decide which documents go on a
21 daily or a weekly; what's the distinction there?

22 A In the IT terminology, these are all full
23 backups; meaning all data is put on the tape.

24 Q Okay. Were any efforts made to preserve
25 documents that pertain to it litigation that were on

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1 backup tapes so that they -- before they were recycled
2 and therefore, you know, deleted?

3 A I am not aware of any searches that were done
4 or any attempts to restore data pertaining to this
5 legal action. Could someone have asked to pull out
6 data and the IT team would have helped them to the
7 best of their ability, that is possible.

8 Q Trying to understand how it works, it's
9 possible for documents to be on the actual server but
10 not on the backup tapes because for whatever reason,
11 the backup tapes have been, you know, recycled, but
12 they're still on the server because they haven't been
13 deleted; does that make sense? Is that correct?

14 A Not the way you said it.

15 Q Is there a way I could have said it that
16 would have made sense? Did you understand what I'm
17 trying --

18 A If the data is on the disk, then when the
19 backup is run, it will be put on the backup tape. If
20 the data has been deleted, then the next time the
21 backup tape runs, that file, which may be on the prior

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22 backup, is no longer on the new backup.

23 Q But when it's put on the backup, it remains
24 on the main server, correct? It's -- it's backed up,
25 but it's still on the main server; is that right?

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1 A The backup is conceptually a Xerox of the
2 main server.

3 MS. BRECKENRIDGE: I understood your
4 question, your original question. That might not be a
5 good thing.

6 BY MR. LITOW:

7 Q There's no recycling of documents that are on
8 the main server; is that correct?

9 A From a technical point of view, the term
10 recycle on the main disk doesn't -- that's not
11 terminology I recognize.

12 Q So we kind of covered this. So documents
13 that are put on there will stay on there unless, you
14 know, one of several things happens: Someone deletes
15 it, there's a virus issue, there's a hardware failure,
16 something like that? It won't be removed as a matter
17 of just, you know, routine procedure?

18 A That is correct.

19 Q Okay.

20 MR. LITOW: Let's take a five-minute break.

21 (Recess taken.)

22 BY MR. LITOW:

23 Q Mr. Rosenberg, I asked you before the break
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